Question Q217

National Group:	Japanese Group
Title:	The patentability criterion of inventive step / non-obviousness
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Questions

I. Analysis of current law and case law
The Groups are invited to answer the following questions under their national laws:

Level of inventive step / non-obviousness

1. What is the standard for inventive step / non-obviousness in your jurisdiction? How is it defined?

(Answer)
Such a definition is found in Article 29 (2) of the Patent Act (the underlined part below).

In Paragraph (1) of this article, there are definitions of a patent that lacks novelty:
(i) inventions that were publicly known in Japan or a foreign country, prior to the filing of the patent application;
(ii) inventions that were publicly worked in Japan or a foreign country, prior to the filing of the patent application; or
(iii) inventions that were described in a distributed publication, or inventions that were made publicly available through an electric telecommunication line in Japan or a foreign country,

prior to the filing of the patent application.

Then, Paragraph (2) provides "Where, prior to the filing of the patent application, a person ordinarily skilled in the art of the invention would have been able to easily make the invention based on an invention prescribed in any of the items of the preceding paragraph, a patent shall not be granted for such an invention notwithstanding the preceding paragraph."

2. Has the standard changed in the last 20 years? Has the standard evolved with the technical / industrial evolution of your jurisdiction?

(Answer)
Not changed. However, there were modifications: adaptation of the criteria of publicly known / publicly worked inventions to the globalization and addition of the passage "inventions that were made publicly available through an electric telecommunication line" with the development of Internet in 1999.

3. Does your patent-granting authority publish examination guidelines on inventive step / non-obviousness? If yes, how useful and effective are the guidelines?

(Answer)
Yes.
The Patent Examination Guidelines provide a basic policy on application of the relevant laws such as the Patent Act that are considered the best at this time in order that examinations may be conducted in a fair, reasonable and efficient manner in accordance with certain standards. The Examination Guidelines have been widely used not only as criteria in examinations but also as a barometer of patent management, etc. by the applicants.

Moreover, the Guidelines are useful for learning about criteria in specific technical fields.

4. Does the standard for inventive step / non-obviousness differ during examination versus during litigation or invalidity proceedings?

(Answer)
The standard is the same.

Construction of claims and interpretation of prior art

5. How are the claims construed in your jurisdiction? Are they read literally, or as would be understood by a person skilled in the art?

(Answer)
Basically, the claims are read literally. When making a finding of a claimed invention, based on which inventive step is determined, the meanings of terms in the claims are construed as what they usually mean as technical terms (Examination Guidelines).

6. Is it possible to read embodiments from the body of the specification into the claims?

(Answer)
A finding of a claimed invention, based on which inventive step is determined, is supposed to be made in the following manner (*Supreme Court decision on "Lipase Case" in 1991*):

"For determination of the patentability requirements under Article 29 (1) and (2), namely, novelty and inventive step of a claimed invention, it is necessary to make a finding of the claimed invention that serves as a precondition for comparison with each of the inventions provided in the paragraph (1) of the same Article. This finding should be made based on the claims unless the circumstances are exceptional — for example, if the technological significance of the claims cannot be understood unambiguously or if the claims are obviously erroneous in the light of detailed description of the invention contained in the body of the specification. Only in such circumstances, the detailed description of the invention in the specification may be taken into consideration."

Thus, under exceptional circumstances as mentioned above that it is possible to take into consideration the embodiments contained in the specification.

7. How is the prior art interpreted? Is it read literally or interpreted as would be understood by a person skilled in the art? Is reliance on inherent disclosures (aspects of the prior art that are not explicitly mentioned but would be understood to be present by a person skilled in the art) permitted?

(Answer)

If prior art is disclosed in a publication, a finding of an invention related to the prior art is made on the basis of "matters described in a publication." Interpretation of the matters in a publication can be made in consideration of common technical knowledge of a person skilled in the art. Matters which a person skilled in the art can derive from the matters described in a publication in consideration of common technical knowledge as of the filing date can also be a basis for a finding of an invention disclosed in a publication. (Examination Guidelines)

Reliance on inherent disclosures is permitted when making interpretation of prior art. For example, if a commercially-available reagent is disclosed in a publication and a specific physical property of this reagent is not described in that publication but it is understandable, from other documents such as a pamphlet, that such a physical property is present in this reagent, it becomes possible to make a finding of this physical property.

8. Do the answers to any of the questions above differ during examination versus during litigation?

(Answer)
There is said to be a difference in to what extent it is allowed to take into consideration of the detailed description of invention contained in the specification between during examination (when making a finding of a claimed invention in relation to inventive step) and during infringement litigation.

As a rule, in infringement litigation, claims shall be interpreted based on the statements in the scope of claims and the meaning of each term used in the scope of claims shall be interpreted in consideration of the statements in the specification and drawings (Article 70 (1) and (2) of the Patent Act). In this way, it is thought that claims may be interpreted in consideration of the statements in the specification to a greater extent during litigation.

Combination or modification of prior art

9. Is it proper in your jurisdiction to find lack of inventive step or obviousness over a single prior art reference? If yes, and assuming the claim is novel over the prior art reference, what is required to provide the missing teaching(s)? Is argument sufficient? Is the level of the common general knowledge an issue to be considered?

(Answer)
It is possible to deny inventive step over a single prior art reference.

The missing teachings may be covered by common technical knowledge, well-known art, design choice, etc. and it is necessary to prove (or disprove) them to be as such on a technical level.

However, there are also cases where argument was sufficient to provide the missing teachings or where the court mentioned the number of documents needed to prove that a claimed invention is well known. Thus, we can also say it case by case basis.

Also, lack of inventive step may be found when there are suggestions concerning the claimed invention in the contents of cited references. The level of the common general knowledge is considered, , as a precondition for the determination. Facts that are thought to be common knowledge of engineers in general will be taken into consideration in examinations of inventions in all technical fields. Facts that are thought to be common knowledge of engineers in a specific technical field will be taken into consideration in examinations of inventions in the relevant technical field.

10. What is required to combine two or more prior art references? Is an explicit teaching or motivation to combine required?

(Answer)
When an explicit teaching or motivation is found in the references, it will be concluded that it was easy to combine the prior art references. The Examination Guidelines give examples of a motivation to combine two or more prior art references as follows:

(1) Close relation of technical fields
(2) Close similarity in problem to be solved
(3) Close similarity in function, work or operation

A judgment on whether it is an adequate motivation is made comprehensively by taking into account various elements such as the cited references, the technical field of the claimed invention, and the state of the art in that field.

11. When two or more prior art references are combined, how relevant is the closeness of the technical field to what is being claimed? How relevant is the problem the inventor of the claim in question was trying to solve?

(Answer)
The closeness of the technical field to what is being claimed is relevant but not absolute. The problem the inventor of the claim in question was trying to solve is also relevant but no absolute.

With an increase in the closeness of technical fields, a motivation to combine prior art references tends to be recognized more easily. A difference in the technical problem can be an obstructive factor for the combination.

12. Is it permitted in your jurisdiction to combine more than two references to show lack of inventive step or obviousness? Is the standard different from when only two references are combined?

(Answer)
Yes. There is no difference, in particular, from when only two references are combined. However, in most of the cases where three or more references are used, one becomes a primary reference and the others are secondary references that will make up for missing elements in the primary reference.

13. Do the answers to any of the questions above differ during examination versus during litigation?

(Answer)
No.

Technical Problem

14. What role, if any, does the technical problem to be solved play in determining inventive step or non-obviousness?

(Answer)

The technical problem can serve as a reason both for denying and accepting inventive step.

For example, when there is a close similarity in the technical problem between the claimed and cited references or when the technical problem of the claimed invention is obvious to a person skilled in the art, the technical problem can be strong grounds for applying or combining cited inventions (Examination Guidelines).

On the other hand, if the technical problem is not suggested in the cited references or it is not obvious to a person skilled in the art, there is a technical significance in the sense that advantageous effects is achieved by solving such a new technical problem. Therefore, the technical problem can be taken into consideration as a factor in acceptance of inventive step.

15. To what degree, if any, must the technical problem be disclosed or identified in the specification?

(Answer)
A technical problem is taken into consideration when it is described in the specification. However, even if not described explicitly in the specification, it is possible that the technical problem may be found to the extent that it is obvious from relations with prior art or description in the specification and drawings.

Advantageous effects

16. What role, if any, do advantageous effects play in determining inventive step or non-obviousness?

(Answer)
If advantageous effects are more remarkable than what is expected from the state of the art, such effects will be taken into consideration as a factor in acceptance of inventive step.

For example, "the inventive step should be positively inferred if a claimed invention has an advantageous effect, qualitatively different or qualitatively the same but quantitatively prominent in comparison with those of cited inventions, and if the advantageous effect cannot be predicted by a person skilled in the art from the state of the art.

17. Must the advantageous effects be disclosed in the as-filed specification?

(Answer)
Since the advantageous effects are one of the factors considered in determination of inventive step, they must basically be described in the as-filed specification, and not be added later. However, for example, it is allowed to submit results of an experiment for comparison with the cited reference in order that such data may taken into consideration in determination of inventive step.

18. Is it possible to have later-submitted data considered by the Examiner?

(Answer)
It is possible to submit data in a written argument in order to be considered by the Examiner.

At least, however, advantageous effects asserted in a written argument must be something that is described in the as-filed specification or that can be inferred from description in the specification or drawings (Examination Guidelines). According to a court decision, if the specification contains description from which a person skilled in the art can infer the "advantageous effects," the applicant may submit experiment results later to assert inventive step.

19. How "real" must the advantageous effects be? Are paper or hypothetical examples sufficient?

(Answer)
According to our opinion, how "real" the advantageous effects must be depends on how much emphasis is placed on these effects.

For example, in the fields of chemistry and biotechnology where the degree of technical predictability is low, advantageous effects of an invention need to be actually verified; paper or hypothetical examples are considered insufficient.

On the other hand, in the fields of machinery and electricity, emphasis is placed on whether the constitution of invention can be easily arrived at (conceived of), and sometimes paper or

hypothetical examples are acceptable without any problems.

20. Do the answers to any of the questions above differ during examination versus during litigation?

(Answer)
No.

Teaching away

21. Does your jurisdiction recognize teaching away as a factor in favor of inventive step / non-obviousness? Must the teaching be explicit?

(Answer)
Yes.
According to the Examination Guidelines, "when there is such a description in a cited reference that precludes the claimed invention from being easily arrived at, this cited reference is not eligible for a primary prior art."

It is not clear how teaching need to be provided so as to be recognized as an obstructive factor. However, it seems that, to be recognized as an obstructive factor in a practical sense, teachings need to be provided in such a way that a cited invention may be considered an obstructive factor which would actively cause a technical contradiction when applied.

22. Among the other factors supporting inventive step / non-obviousness, how important is teaching away?

(Answer)
Teaching away can be a factor in acceptance of inventive step. However, it is one of the factors, like the technical problem and advantageous effects of invention, that are used for determination of inventive step. Inventive step of an invention is determined by comprehensively considering both the negative factors in inventive step (close similarity in problem to be solved, close relation of technical fields, close similarity in work or operation, etc.) and positive factors (remarkable effects, obstructive factors, etc.).

23. Is there any difference in how teaching away is applied during examination versus in litigation?

(Answer)
No.

Secondary considerations

24. Are secondary considerations recognized in your jurisdiction?

(Answer)
Yes. The Examination Guidelines say, "A commercial success or other similar facts can be taken into consideration in order to support to affirmatively infer inventive step."

However, there must be a close connection between the secondary considerations and the claimed invention. It is quite rare that such connection is accepted and the secondary considerations are recognized as a positive factor in inventive step.

25. If yes, what are the accepted secondary considerations? How and to what degree must they be proven? Is a close connection between the *claimed* invention and the secondary considerations required?

(Answer)
[The following are considered as secondary considerations. However, this does not necessarily mean that there are cases where each of these considerations were recognized as a factor in acceptance of inventive step.]

- Commercial success
- State of not being achieved for a long time
- Existence of many licenses

[Proof of secondary considerations]
It is necessary to be able to prove that a commercial success etc. was achieved on the basis of features of the invention.

We give examples of court decision related to secondary considerations below. Actually, secondary considerations are not recognized in a predominant number of cases.

- Commercial success

There is a case where the court accepted inventive step, judging that the advantageous effects described in the specification and economic effects of the invention were obvious (*Tokyo High Court decision in 1992*).

There is a case where the court denied inventive step, judging that a commercial success does not influence the predictability of effects of the invention (*Tokyo High Court decision in 1997*).

There is a case where the court denied inventive step, judging that even if a new product drives out an existing type of products from the market, it cannot necessarily be said that this is due to the superiority of the new product, because reasons for this also include the product's economical efficiency, design and marketing method, as well as the economic situation and other variables (*Supreme Court decision in 1975*).

- State of not being achieved for a long time

There is a case where the court accepted inventive step, pointing out the fact that the claimed invention had not actually been applied and its production was expected to be difficult (*Tokyo High Court decision in 1971*). In this case, the applicant sent out a questionnaire to people in the same trade, and the court recognized that their answers had probative value.

There is a case where the court denied inventive step, judging that the state of not being arrived at (conceived of) for a long time or a commercial success does not influence the determination of conceivability of the claimed invention, regardless of whether it is true or not (*Tokyo High Court decision in 2004*).

26. Do the answers to any of the questions above differ during examination versus during litigation?

(Answer)
No.

Other considerations

27. In addition to the subjects discussed in questions 4 - 26 above, are there other issues, tests, or factors that are taken into consideration in determining inventive step / non-obviousness in your jurisdiction? If yes, please describe these issues, tests, or factors.

(Answer)
There is not a particular test for determination of inventive step. However, the Examination Guidelines explains points to keep in mind (i.e. a policy) concerning a typical approach to determination of inventive step:

(1) Selection of an optimal material, workshop modification of design
The Examination Guidelines say, "Among exercises of ordinary creativity of a person skilled in the art are a selection of an optimal material from publicly known materials which achieve a specific object, an optimization of a numerical value range, a replacement with equivalents, and a workshop modification of design in applying specific technology. When the difference of a claimed invention in comparison falls only under these categories, it is usually considered that a person skilled in the art could have easily arrived at it, unless otherwise there is another ground for inferring inventive step."

(2) Mere aggregation of features
The Examination Guidelines say, "If matters defining an invention are not linked each other functionally or operationally and the invention is a combination of each matter (mere aggregation of features), the invention is deemed as a mere exercise of ordinary creativity of a person skilled in the art, unless otherwise there is another ground for inferring inventive step."

(3) Elimination of hindsight
Although not mentioned in the Examination Guidelines, there is a precedent where the court ruled that hindsight shall be eliminated (*Intellectual Property High Court decision in 2008*).

Test

28. What is the specific statement of the test for inventive step/non-obviousness in your jurisdiction? Is there jurisprudence or other authoritative literature interpreting the meaning of such test and, if so, provide a brief summary of such interpretation.

(Answer)
[Test for inventive step]
According to the Examination Guidelines, inventive step is determined by performing the following procedure:

(1) Finding of the claimed invention
(2) Finding of cited inventions
(3) Selection of one cited invention most suitable for the reasoning
(4) Finding of identicalness and difference between the claimed invention and the primary cited invention
(5) Decision on the difference

- Whether the claimed invention falls under a selection of optimal material, a workshop modification of design, a mere juxtaposition of features on the basis of cited inventions;

- Whether the contents of cited inventions disclose a cause or a motivation for a person skilled in the art to arrive at the claimed invention (any of (1) close relation of technical fields, (2) close similarity in problem to be solved, (3) close similarity in function, work or operation, and (4) suggestions shown in the contents of cited inventions); and

- Whether the advantageous effects are greater than expected.

Finally, determination of inventive step is made based on the evaluation of the above.

According to a book (*Commentaries on Patent Law* by Nobuhiro Nakayama), inventive step is usually determined in a comprehensive manner through comparison with a publicly known invention in terms of the purpose, constitution and advantageous effects of the invention. This book says that there are three approaches: one that puts emphasis on the constitution, one that puts emphasis on the advantageous effects, and one that consider the three elements equally, although how each of these elements should be considered depends on the type of invention. Each of these approaches has advantages and disadvantages, but it

is normal that inventive step is determined mainly based on the constitution of the invention, according to this book. It also explains that what is considered in making a determination of inventive step of an invention is the predictability and characteristics of its purpose, the predictability and difficulty of its constitution, and the predictability of its advantageous effects.

[Literature that makes interpretation of meaning of test]
Such articles and books abound, but most of them give explanations of the test for inventive step in accordance with the JPO's Examination Guidelines. There are not books or articles, in particular, that are considered the most authoritative.

29. Does such test differ during examination versus during litigation?

(Answer)
The Examination Guidelines are used in determination of inventive step at the Japan Patent Office. However, past court cases are reflected in the Guidelines, and therefore, there is not a big difference in the test between examination and litigation.

Patent granting authorities versus courts

30. If there are areas not already described above where the approach to inventive step / non-obviousness taken during examination diverges from that taken by courts, please describe these areas.

(Answer)
No.

31. Is divergence in approach to inventive step / non-obviousness between the courts and the patent granting authority in your jurisdiction problematic?

(Answer)
In 2000, a revision was made to the Examination Guidelines in relation to inventive step. The Supreme Court's decision on the "Kilby Case" in the same year made it possible for the court to rule on validity of patents in infringement cases. As a result, there was confusion due to variations in determination of inventive step between the court and the JPO, but

thanks to efforts by all parties concerned, their decisions have become more consistent now. However, there is a problem of dual path, that is, a situation where a patent invalidation trial at the JPO is underway concurrently with a lawsuit on validity of the patent at the court. Now, to prevent a discrepancy in their decisions under such a situation, the invalidation trial is set to take precedence.

Regional and national patent granting authorities

32. If you have two patent granting authorities covering your jurisdiction, do they diverge in their approach to inventive step / non-obviousness?

(Answer)
We do not have such a problem.

33. If yes, is this problematic?

(Answer)
We do not have such a problem.

II. Proposals for harmonization
The Groups are invited to put forward proposals for the adoption of harmonised rules in relation to the patentability criteria for inventive step / non-obviousness. More specifically, the Groups are invited to answer the following questions without regard to their national laws:

34. Is harmonization of inventive step / non-obviousness desirable?

(Answer)
Yes. Harmonization should be achieved through typical, representative, and principled approaches.

Many Japanese companies are actively working on the globalization of their business activities . In the globalized business activities, it is important that there be uniformity of eligibility for patents applied for by different companies in Japan and other major countries

and that this eligibility be predictable.

Work on the harmonization of inventive step / non-obviousness should be carried out based on the understanding of common goals such as a reduction of cost for obtaining a patent, the same level of quality of examinations at every Patent Office, rules on when to issue Office Action, etc.

35. Is it possible to find a standard for inventive step / non-obviousness that would be universally acceptable?

(Answer)
It may be difficult but possible. To find a universally acceptable standard, it will be necessary to find out what is identical / different among the standards of various countries and then identify what are good / bad points of these standards. The problem of difference in difficulty level of inventive step standards exists especially between the developed and developing countries. We think, therefore, the developed countries (Trilateral IP Offices or IP5 (3 + China and Korea)) should initiate an effort to create a framework that may be extended to the other countries in the future.

36. Please propose a definition for inventive step / non-obviousness that you would consider to be broadly acceptable.

(Answer)
Instead of a subjective concept such as "inventor's efforts" or an ambiguous one like "flash of creative genius" (*US Supreme Court decision on Cuno Engineering v. Automatic Device Corp. in 1941*), a definition needs to be able to serve as an objective evaluation standard. For example: Article 29 (2) of the Japanese Patent Act (whether a person ordinarily skilled in the art would have been able to easily make the invention), Section 103 of the US Patent Law (whether the subject matter would have been obvious to a person having ordinary skill in the art), or Article 56 of the European Patent Convention (whether it is obvious to a person skilled in the art). Any of the above would be sufficient to ensure objectivity as a definition.

Whether such a definition becomes broadly acceptable will depend on how it is developed as a standard, not on what the definition is. If a unified standard is developed through a process approved by participant countries, then these members will have to adhere to it. We think, we can employ an ordinary standardization process or a decision-making /

organizing process used in the EU and other communities.

37. Please propose an approach to the application of this definition that could be used by examiners and by courts in determining inventive step / non-obviousness.

(Answer)
Effective approaches include: a problem-solution approach in Europe, a determination approach in the US adopted after the KSR decision, and an approach shown in the Examination Guidelines in Japan. Although they differ from one another, each of them is adequate in its own way. When operated properly by the examiners, it seems that there will not be a major difference in resulting decisions.

First, the countries need to share policies and points to keep in mind concerning the typical approaches to determination of inventive step. Instead of only focusing on what a determination approach should be, it is necessary to apply specific cases to each of these approaches and compare the results.

While conducting these case studies, it is necessary to check on points of concern, for example, whether there is a risk of an irrational finding or forced reasoning typically caused by hindsight, whether a high difficulty level of inventive step standard may lead to an extremely imbalanced operation, and whether there may be variations in the results among the examiners.

Through the process described above, a more appropriate approach will be selected or created, we think.

SUMMARY

The inventive step criteria of Japan is stipulated in Article 29 paragraph 2 of the Patent law, which reads that “if an invention which would have been able to easily make based on prior arts, such an invention shall not be granted”. Also, the Japanese Patent Office (JPO) issues an examination guide line that is well used by the applicant and attorneys. As a practice of judgment of the inventive step, there is an established routine that (1) an invention and closest prior art are compared, (2) extract identicalness and differences between two arts and (3) judge if the differences can be easily overcome by

an ordinaly o skilled in the art based on other evidences etc. Around the year 2,000, the examination guideline was revised and a supreme court decision ruled that a court handling a litigation can tell a validity of the patent in question. After this, validity standards between the court and JPO became inconsistent and some confusions occurred. However, such a confusion is now ceased and the judgments are stable. Currently, there are two different courses in the judgment of validity of the patent, i.e. invalidity trial before JPO and litigation in the court. This problem is called “double track problem” and there is an argument that such a double track situation is not favorable in view of the stability of the patent right.

RÉSUMÉ

Au Japon, le critère de l’activité inventive est stipulé à l’Article 29-2 de la Loi sur les brevets, qui indique que cette activité est absente si « l’homme du métier aurait pu réaliser l’invention facilement d’après la technique antérieure ». Par ailleurs, au titre de ses directives de jugement sur l’existence ou non d’activité inventive, l’Office japonais des brevets (JPO) publie des critères d’examen, et ceux-ci sont largement utilisés. Concernant la méthode de jugement de l’activité inventive, une pratique établie consiste à (1) comparer l’invention en question avec une invention citée, (2) extraire les points communs et différences entre les deux inventions, et (3) juger d’après d’autres preuves si ces différences étaient des points faciles à surmonter pour l’homme du métier. Les critères d’examen ont été révisés vers l’an 2000, et la Cour suprême a jugé que la validité d’un brevet (le jugement sur l’activité inventive ou non) peut être établie par un tribunal qui statue sur une contrefaçon. Cependant, une confusion est ainsi née entre l’Office des brevets et les tribunaux au sujet des critères de jugement de l’activité inventive, ce qui a appelé un débat. Il est toutefois considéré que la situation se stabilise à présent. Deux voies existent aujourd’hui pour juger de la validité d’un brevet (situation appelée « problème de la double voie ») : celle du jugement d’invalidité délivré par l’Office des brevets et celle du jugement d’un tribunal statuant sur la contrefaçon. Certaines critiques font remarquer que ceci nuit à la stabilité des décisions.

ZUSAMMENFASSUNG

Die Maßstäbe zur Beurteilung der erfinderischen Tätigkeit sind in Japan durch Art. 29

Abs. 2 geregelt, wo es heißt, dass dann keine erfinderische Tätigkeit vorliegt, „wenn ein Durchschnittsfachmann auf dem Gebiet die Erfindung anhand des Stands der Technik leicht hätte tätigen können“. Das Patentamt hat die Prüfungskriterien veröffentlicht, die als Leitlinie zur Bestimmung des Vorliegens erfinderischer Tätigkeit dienen; sie finden breite Anwendung. Bei der Beurteilung der erfinderischen Tätigkeit hat sich eine Praxis etabliert, die folgende Schritte umfasst: (1) Vergleich zwischen der Erfindung und dem relevanten Stand der Technik, (2) Analyse der Übereinstimmungen und Abweichungen, (3) anhand weiterer Belege usw. eine Darlegung dessen, ob ein Durchschnittsfachmann die Abweichungen ohne Weiteres hätte überwinden können. Um das Jahr 2000 wurden die Prüfungskriterien überarbeitet; außerdem ermöglichte ein Urteil des Obersten Gerichtshofs es Gerichten, die sich mit Verletzungsklagen befassten, über die Gültigkeit eines Patents (der erfinderischen Tätigkeit) zu befinden. Dies schuf Unklarheiten in Bezug auf die jeweiligen Beurteilungskriterien von Patentamt und Gerichten und führte zu einigen Diskussionen; heute hat sich die Lage jedoch im Wesentlichen stabilisiert. Gegenwärtig stehen hinsichtlich der Beurteilung der erfinderischen Tätigkeit zwei Wege offen, nämlich zum einen eine Nichtigkeitsklage über das Patentamt und zum anderen ein Urteil durch ein Gericht, das eine Verletzungsklage bearbeitet (das so genannte Doppelwegproblem), weshalb kritische Stimmen Ungleichmäßigkeiten in der Beurteilung beklagen.